FOR ARGUMENT

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No. 91-779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THOMAS L. JOHNSON,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

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REPLY BRIEF FOR PETITIONER

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[1] The parties to the proceeding below and Rule 29.1 statement appear in Pet. Br. at ii, and no changes have occurred with respect to the latter.

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Petitioner's opening brief argued that the Equal Protection Clause of the Fourteenth Amendment assures a right to equal treatment for foreign corporations under state venue laws. The briefs of respondents and their amici do nothing to diminish the importance of venue rules to a convenient and fair place for trial.[2] To the contrary, their responsive briefs reaffirm that venue is

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[2] The amici in support of respondents are the States of Montana, New Mexico, North Dakota, South Dakota, Texas, and Wyoming

a vital matter in the give-and-take of civil litigation. Indeed, as to the specific issue in this case, the Montana legislature is quoted to the effect that "the *most fundamental of all venue rules* [*is*] *that the defendant has the right to have the trial in his county of residence.*" [3] This leaves only the question whether a state can confer substantial venue advantages to Montana-incorporated companies while denying these same advantages to "foreign" corporations that have been admitted to do business in the state.[4]

I. THERE IS NO RATIONAL BASIS FOR THE DISPARATE TREATMENT OF FOREIGN CORPORATIONS UNDER MONTANA VENUE LAW

Respondents agree that Montana's "any county" rule with respect to foreign corporations originated in *Pue v. Northern Pac. Ry.*, 78 Mont. 40, 252 P. 313, 315 (1926), in which the Montana Supreme Court held that "unless [a foreign corporation] is given a domestic residence by some statutory provision, it remains a nonresident of the state and comes within the provision that such person may be sued in any county of the state." *See* Resp. Br. at 1-3. The Montana trial lawyers emphasize the legisla-

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("States' Br.") and the Montana Trial Lawyers Association ("MTLA Br.").

[3] MTLA Br. at 3 (quoting Montana Code Annotated (1991) ("MCA"), ch. 2, § 25-2-118, at 15-16) (Venue)) (emphasis added).

[4] BN unquestionably has standing to challenge the Montana venue law as discriminatory. BN is disadvantaged in that a comparable domestic corporation—one that does business in numerous counties—could be sued in only one county in this case, whereas BN can be sued in any county. This application of state law suffices to create standing. *See, e.g., Barrows v. Jackson*, 346 U.S. 249, 255-56 (1953). Indeed, it is amici that would have this Court address a hypothetical situation: a state venue law permitting a foreign corporation to be sued in any county in which it does business, but not elsewhere. States' Br. at 3-7. This Court also will not apply prudential standing doctrines where standing was not challenged below and the constitutional questions have been effectively presented. *See, e.g., Craig v. Boren*, 429 U.S. 190, 193-94 (1976).

tive history of the 1985 revision of the Montana venue statute, but the only explanation in that legislative history is a reiteration of the abstract reasoning of *Pue*:

> Since, by definition, a nonresident of the state is not resident in *any* county, the basic rule of subsection (1) cannot apply. In this situation the statute has always given the right of choosing venue to the plaintiff, and this draft contemplates no change.

MTLA Br. at 3 (quoting MCA, ch. 2, § 25-2-118, at 15-16 (Venue)). *See also* Resp. Br. at 2-3 (quoting same history and relating it to *Pue*).

The problem with respondents' position is that the *Pue* "by definition" rationale is not a *rational* basis for the statutory discrimination. The statement in *Pue* is tautological: it does not refer to any state policy that is furthered by the discrimination. As traced in petitioner's brief, *Pue* had its origins in the metaphysical notions of corporate existence prevalent in the middle to late nineteenth century. Pet. Br. at 25 n.28. Even in 1926, *Pue* was a throwback to a bygone era of corporate and constitutional law in which it was believed that a corporation could not have an existence outside its state of incorporation. When respondents cite *Pue*, they do so with "citations omitted." Resp. Br. at 2. Each of the cases cited in *Pue* in support of the concept that a foreign corporation "cannot" have an in-state residence for purposes of venue has been overruled in the state in which it was decided.[5] Thus, the *Pue* theory has been thoroughly discredited.

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[5] *See Pue*, 252 P. at 315. *Boyer v. Northern Pac. Ry.*, 66 P. 826 (Idaho 1901), was overruled by *Banning v. Minidoka Irrig. Dist.*, 406 P.2d 802, 804 (Idaho 1965); *Eickhoff v. Fidelity & Casualty Co.*, 76 N.W. 1030 (Minn. 1898), was overruled by *State ex rel. Twin City & S. Bus Co. v. District Court of Otter Tail County*, 225 N.W. 915, 916 (Minn. 1929), and later by *Smith v. Utah Home Fire Ins. Co.*, 47 N.W.2d 785 (Minn. 1951); *Waechter v. Atchison, T. & S. F. Ry.*, 101 P. 41 (Cal. 1909), was overruled by *Hale v. Bohannon*, 241 P.2d 4 (Cal. 1952); and *Stone v. Travelers Ins. Co.*, 78 Mo. 655 (1883), was overruled by *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. 1962). *Rhodes v. Salem Turnpike & Chelsea*

From any practical perspective, there is no basis for the notion that a foreign corporation is wholly incapable of establishing a residence outside of its state of incorporation. A number of other states have explicitly enacted statutes permitting foreign corporations to establish an in-state residence for purposes of venue.[6] In many other states, judicial interpretation has reached the same result.[7] That Montana does not permit foreign corporations to domesticate themselves in this manner is an integral element of the discrimination here, rather than a proper justification for it. Thus, the sole rationale actually advanced by the Montana legislature falls well short of supplying a rational basis for the discrimination in venue against foreign corporations.

If a state legislature has clearly expressed its statutory purpose, otherwise "conceivable" grounds need not and should not be considered.[8] Here, the Montana legislature clearly adopted the *Pue* "by definition" rationale. The briefs confirm that the legislative history is definitive with respect to the legislative purpose. The Montana

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Bridge Corp., 98 Mass. 95 (1867), involved application of the venue statute to a domestic corporation and did not discuss nonresident corporations.

[6] *See* state laws cited in Pet. Br. at 16 & n.19.

[7] *See* cases cited in Pet. Br. at 15-16 & n.18.

[8] *See Zobel v. Williams*, 457 U.S. 55, 61 n.7 (1982) (three purposes having been enumerated in the statute, "we need not speculate as to the objectives of the legislature"); *Lindsey v. Normet*, 405 U.S. 56, 70 n.18 (1972); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1959) ("[h]aving themselves specifically declared their purpose, the Ohio statutes [challenged in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949)], left no room to conceive of any other purpose for their existence"); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'") (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975)).

trial lawyers assert that "[i]t is hard to imagine a state having a more comprehensive up-to-date legislative history than Montana's 1985 total revision of its venue statutes." MTLA Br. at 4; *see also* Resp. Br. at 8 & n.7. The Montana Supreme Court supplied no independent rationale. *See* Pet. App. 9a. Under these circumstances, other arguments in favor of the disparate treatment are entitled to little, if any, consideration. This is particularly true when none of the additional legislative purposes now being put forward were presented to the Montana courts, let alone adopted by them.

In any event, the purposes now presented do not provide a rational basis for the discrimination woven years ago into the Montana venue scheme. Respondents' main argument is that the purpose of the Montana venue law "is to promote the convenience of *residents* . . . ." Resp. Br. at 6 (emphasis added). This, of course, begs the question of why foreign corporations with a registered agent and a place of business in the state are not afforded the same venue advantages as domestic corporations. Respondents attempt to bridge this gap with an unsupported, and insupportable, assertion that "foreign corporations . . . normally will not derive similar benefits from being sued at a particular location in the state." Resp. Br. at 6; *see also id.* at 9 ("convenience considerations are usually inapplicable to foreign corporations"). To the contrary, any foreign corporation with a place of business in the state will derive precisely the same benefits of convenience from being sued at that location. There is no rational fit between the convenience interest and the Montana venue law that is supposedly its result.

Respondents' theory ignores modern corporate reality. Literally thousands of major U.S. corporations are, like petitioner, incorporated in Delaware and have a principal office in each state in which they do business. Like petitioner, these foreign corporations have their responsible local officers and their books and records at their headquarters within the state. The alleged state goal of

serving the convenience of defendants requires that each of these foreign corporations be sued in its principal place of business within the state. The fact that there are also some foreign corporations that "are not present" at all in Montana, or are present "only through the use of transient personnel," Resp. Br. at 9, cannot justify a denial of equal venue treatment to those corporations doing business in Montana whose only real difference from domestic Montana corporations is the state of incorporation.[9] That goal of convenience is *not* served by making each of these corporations subject to suit in *every* county in the state.[10]

In straining to defend the rationality of Montana's statute, respondents and their amici exaggerate the diffi-

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[9] Respondents cite *Quill Corp. v. North Dakota*, No. 91-194 (U.S. pending), in this connection. But *Quill* involves an out-of-state mail order operation with no fixed place of business in the state. This exceptional, if not extreme, situation does not provide an appropriate archetype for the foreign corporation. In *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), the Court focused on foreign corporations with fixed places of business in the state. *See id.* at 494 ("We speak only of them.").

[10] An additional fallacy in respondents' theory is that the favorable treatment in the Montana venue law is not limited to corporations that have their principal place of business in Montana. The determinative factor under the Montana venue statute for establishing domestic corporation status is *incorporation* in Montana. MCA § 35-1-113 defines a "domestic corporation" as one which is "not a foreign corporation and that is incorporated under or subject to the provisions of this chapter." A "foreign corporation" is one which is "incorporated under a law other than the law of this state." MCA § 35-1-113(10). In *Pue*, the Montana Supreme Court relied on the common law precept that "a corporation could not migrate from the state of its creation," thus focusing on the defendant's state of incorporation. 252 P. at 314-15. Thus, a Montana-incorporated company with its principal place of business outside the state—for instance, the Red River Valley & Western Railroad—qualifies for preferred treatment in venue. If convenient access to officers and records of the corporation were the objective of the statutory distinction, then focusing on the defendant's state of incorporation would make no sense.

culty plaintiffs would experience in identifying the Montana "residence" of a foreign corporation doing business in the state. No such issue exists in this case, where petitioner's principal place of business in the state is manifest and was accepted by the Montana Supreme Court. Pet. App. 4a. Furthermore, there is no reason to suppose that identification of the principal in-state place of business of a foreign corporation will be any more difficult than for a domestic corporation. At the time this case arose, a domestic corporation in Montana was *not* required to designate its principal place of business in its incorporation papers or annual report.[11] Respondents themselves assert that "there has never been a case raising a question about the appropriate residential venue for a domestic corporation." Resp. Br. at 13. The discretion of a foreign corporation in establishing or identifying its principal office was, and is, no broader than that of a domestic corporation.

If the State is genuinely concerned that there could be uncertainty, any doubt could be avoided through the simple expedient of a requirement that all foreign corporations identify their principal in-state place of business in a corporate filing with the State. In fact, for 74 years (from 1893 through 1967) Montana required foreign corporations admitted to do business to submit an annual certificate designating their principal place of business in the state.[12]

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[11] As respondents point out, domestic corporations were required to identify the addresses of their officers and directors, Resp. Br. at 2, which might or might not indicate the corporation's principal place of business. Not until 1991, after this case arose, did Montana unambiguously require domestic corporations to designate a principal place of business. MCA § 35-1-1104.

[12] This provision, first included in an Act passed in 1893, required foreign corporations to file with the Secretary of State a certificate stating "the principal place of business of such corporation *in this state*." Mont. Code tit. XI, § 1030(1) (1895) (emphasis added). A similar requirement was re-enacted as MCA § 15-1701(1) (1947), and remained on the books until 1967.

Respondents' hypothetical of a foreign corporation that owns and operates three drug stores in different counties in the state is illustrative of petitioner's point. *See* Resp. Br. at 13-14. Whatever difficulty a plaintiff would have in identifying a principal place of business if the corporation were incorporated in another state, the plaintiff would also have if the corporation were incorporated in Montana. Moreover, given the obvious feasibility of designation requirements, as enacted in many states, these uncertainties would not be significant regardless of the state of the defendant's incorporation. *But most important, the supposed difficulties in choosing among the three counties cannot conceivably justify opening up the defendant corporation to suit not only in all three of those counties, but also in all of the other fifty-three counties in Montana.* Merely because Montana currently affords no recognition of a foreign corporation's principal place of business in the state does not entitle it to impose an "any county" venue rule for these defendants that ignores their convenience altogether. Montana venue law is the product of fiat, not reason.

Respondents repeatedly proffer the dissent in *Saunders* as supporting their concept of convenience. *See* Resp. Br. at 10-11, 15-16. Not even that dissent, however, offers much support. Justice Holmes hypothesized that "[a] foreign corporation merely doing business in the State *and having its works elsewhere* is more or less inconvenienced by being sued anywhere away from its headquarters." 274 U.S. at 498 (Holmes, J., dissenting, joined by Brandeis, J.) (emphasis added). Thus, Justice Holmes was *not* addressing a situation such as petitioner's, with substantial working assets and a large headquarters and staff located in the state.

In addition, the majority in *Saunders* found Justice Holmes' hypothetical inapposite to the situation before the Court. The majority focused instead on the discrimination against "foreign corporations doing business within the State by her permission, and therefore having a fixed

place of business therein and a resident agent on whom process may be served." *Id.* at 494. The Court recognized that "*considerations of convenience and economy*" might well motivate the restriction of venue for domestic corporations, but expressly concluded that "*these considerations have equal application to foreign corporations.*" *Id.* (emphasis added). A convenience rationale cannot be any more compelling in this case, after six decades of expansion of multistate businesses across state lines.

Respondents contend that, at worst, the Montana venue scheme is only a little under- or over-inclusive. Resp. Br. at 5, 12, 14. But the central flaw in the Montana venue law is that it treats foreign corporations with a fixed place of business and registered agent in the state—surely the largest group of foreign corporations and that most likely to become involved in state court litigation—in a manner different from their domestic counterparts. Foreign corporations that do not enter the state at all cannot be made the paradigm for the state venue law. *Saunders* holds that the relevant comparison is between domestic corporations and their foreign counterparts with a fixed place of business and a registered agent for service of process in the state. 274 U.S. at 140. Respondents attempt here to cast a classification functionally identical to the *Saunders* statute as tolerably over-inclusive, but this is an empty rhetorical exercise. Called by any name, the Montana venue law must be stricken on the authority of *Saunders*.

One last candidate is presented for a "rational basis" for the discrimination in Montana venue law: the alleged advancement of the State's interest in helping injured persons to hold foreign corporations accountable for their injuries.[13] There is no basis in Montana law, however,

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[13] Tellingly, this rationale is not advanced either by respondents, the plaintiffs in the underlying case, or by the plaintiffs' trial lawyers association, just as it was not mentioned below by any of the Montana courts. Even the States raise it in a half-hearted fashion, quoting a concurring opinion of this Court, which in turn quotes an intermediate state court that expressly recognized that the "justifi-

to believe that enforceability of judgments is more difficult when the defendant is a foreign corporation than when it is a Montana-incorporated company.[14] In Montana, enforcement of a judgment against a foreign corporation is just as certain and as uncomplicated as it is against a domestic corporation. Once a judgment has been rendered, it is enforced through a writ of execution on the judgment debtor's property, both real and personal. MCA § 25-13-501. The execution may be issued simultaneously to the sheriff or levying officer of *every* county in Montana for enforcement. MCA § 25-13-401. Thus, it is no more burdensome for a plaintiff in Montana to enforce a judgment against a foreign corporation doing business in the state than against any other defendant. The "accountability" argument of amici on behalf of respondents provides no more rational basis for venue discrimination against foreign corporations than any of the other rationalizations advanced in its favor.[15]

Of course, the convenience and enforceability considerations mentioned by amici may justify a distinction between resident and nonresident *individuals*. Unlike foreign corporations licensed to do business in the state,

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cation is less evident" as to foreign corporations licensed to do business in a state. States' Br. at 13-14 (quoting *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 647 (1976) (Burger, C.J., concurring, joined by Rehnquist, J.) (quoting *Commercial Ins. Co. v. Adams*, 366 S.W.2d 801, 808-09 (Tex. Civ. App.), *aff'd*, 369 S.W.2d 927 (1963))).

[14] Petitioner has already explained how Montana law ensures ready service of process on foreign as well as domestic corporate defendants. Pet. Br. at 27.

[15] Respondents' only reference to the rationale actually relied on by the Montana Supreme Court—that the discrimination in this case was justified by the asserted pro-plaintiff policies of the FELA—is the suggestion in a footnote that this might provide an "independent ground on which to affirm the judgment below." Resp. Br. at 21-22, n.19. That rationale has been fully refuted in petitioner's opening brief, Pet. Br. at 27-32, and neither respondents nor their amici have made any effort to answer that analysis.

nonresident individuals will not have a registered office or a designated agent for service of process. Thus, nonresident individuals may present different issues with respect to effective service and enforcement of judgment. Moreover, nonresidents who do not enter the state or who are truly transient do not implicate the same convenience considerations as a foreign corporation with a fixed place of business in the state.[16]

Thus, considerations of convenience and enforceability may justify some different rules for individuals and aliens. But they do not justify wide-open venue for corporations whose only different attribute is incorporation in another state. A venue system for U.S. corporations that is predicated solely on that distinction is irrational, and cannot survive even the most lenient equal protection test.

II. *SAUNDERS* REMAINS CONTROLLING PRECEDENT

This Court's decision in *Saunders* resolves virtually all of the issues raised by respondents. *Saunders* deals with a similar fact situation, indicates that a state must deal realistically with foreign corporations that have a fixed office within the state, and rejects the notion that all locations within a state are equally convenient to such a foreign corporation. Respondents claim they would merely limit *Saunders* to its facts, but they effectively ask this Court to overrule it. That would be a surprising fate for a decision that has not proved unworkable or even contro-

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[16] Respondents also advert to the federal statute prescribing venue for alien corporations, 28 U.S.C. § 1391(d) (1988). However, venue for an entity incorporated in a foreign country raises different concerns than for one incorporated in the United States—including concerns relating to enforcement abroad. In any event, all defendants in the federal courts, including alien corporations, are protected by the federal transfer provisions (28 U.S.C. § 1404(a) (1988)) with regard to a totally inconvenient venue—a remedy whose analog (*forum non conveniens*) the Montana courts have specifically denied to FELA defendants.

versial, but rather has been woven into the laws of most states, and has been cited as authoritative by this Court.

Initially, respondents seek to distinguish *Saunders* on the ground that it involved a statute permitting suit against a domestic corporation in *any* county where it had an office, whereas the statute here limits suit against a domestic corporation to its *principal* place of business in the state. *See* Resp. Br. at 15. This argument turns equal protection analysis on its head. Respondents would *invalidate* a statute that permitted statewide venue against foreign corporations when domestic corporations could be sued wherever they did business. Yet respondents' theory would *approve* the same statewide venue against foreign corporations when domestic corporations could be sued in only a single county. The result of respondents' theory is that a moderate amount of discrimination in venue would be prohibited by the Equal Protection Clause, but an extreme discrimination would go unchecked.

The real point of *Saunders* is that, as "pertinen[t] to the venue of transitory actions," the "situation" of "foreign corporations doing business within a state by her permission, and therefore having a fixed place of business therein and a registered agent" is "not distinguishable from that of domestic corporations." 274 U.S. at 494. That principle controls the case at bar.

Implicitly conceding the weakness of their purported distinction, respondents urge that *Saunders* is "probably no longer good law." Resp. Br. at 15. Respondents stop just short of suggesting that a decision of this Court has overruled *Saunders*. Rather, their argument proceeds from the assumption that the decision in *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931), issued just four years after *Saunders*, somehow constituted an adoption by the Court of the views expressed in the *Saunders* dissent. *See* Resp. Br. at 15. Since five members of the Court that decided *Bain Peanut* had joined in the major-

ity opinion in *Saunders*, it seems highly unlikely that they would have repudiated their own prior decision and endorsed the dissent without even mentioning that fact.

Respondents' argument seems to be based on nothing more than the fact that the author of the unanimous opinion in *Bain Peanut* was Justice Holmes, who had dissented in *Saunders*. But the *issues* in *Bain Peanut* were entirely different from those in *Saunders*. In *Bain Peanut*, the Court merely reaffirmed the conclusion previously reached in *Cincinnati State Ry. v. Snell*, 193 U.S. 30 (1904), that, in view of the differences between corporations and individuals, the two classes need not be treated identically for venue purposes. 282 U.S. at 501-02. Thus, the Court noted, "there is likely to be such a difference between the business done by a corporation and that done by a private person that the State may well take it into account when it permits a corporation to be formed." *Id.* at 501.

The reasoning of *Bain Peanut* is to be distinguished from the reasoning of the *Saunders* dissent, which was predicated primarily upon the asserted power of a state to condition entry on a foreign corporation's relinquishment of its constitutional right to equal venue treatment,[17] as well as on certain supposed differences between foreign and domestic corporations. Thus, *Bain Peanut* involved a different issue from that addressed in *Saunders*, and the coincidence that the author of that decision had dissented in *Saunders* cannot be read to undercut *Saunders*.

The only other support offered by respondents for the claim that *Saunders* is no longer good law is the notion that the Court in *American Motorists Insurance Co. v. Starnes*, 425 U.S. 637 (1976), somehow overruled *Saun-*

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[17] This aspect of Justice Holmes' dissent was flatly rejected by the majority in *Saunders*. 274 U.S. at 497. The view of the *Saunders* majority is now, of course, settled law. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657-658 (1981).

ders sub silentio. See Resp. Br. at 16. Respondents' argument is based solely on *dicta* in a footnote in *Starnes* that cites three decisions as "rais[ing] the question whether *Saunders* continues to be good law." *Id.* at 645 n.6. But, apart from their *Bain Peanut* argument, respondents make no effort to show how any of the cited decisions actually cast doubt on the continuing validity of *Saunders*.[18] BN has previously demonstrated that none of the cases mentioned in the *Starnes* footnote in fact call *Saunders* into question. *See* Pet. Br. at 36 n.37. Though challenged to connect the language of the *Starnes* footnote to its citations, respondents present no such analysis.[19]

Finally, *Saunders* does not stand as an isolated case outside the mainstream of Court precedent. To the contrary, the Court has frequently invalidated other statutes by which states discriminated against nonresidents and in favor of residents. *See* Pet. Brief at 11-12, 19-22. Respondents offer little rebuttal to the cases that comport with the reasoning of *Saunders*.[20] If anything, the rea-

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[18] Indeed, although respondents single out a quotation from one of those cases, *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580 (1935), they conveniently ignore the fact that *Brownell* itself explicitly relied on *Saunders* as establishing the controlling standard by which the equal protection claim there at issue must be judged. *See* 294 U.S. at 583.

[19] Respondents and amici trial lawyers attempt to discredit BN's arguments by citing to certain views stated in a brief filed by petitioner with the Montana Supreme Court several years ago in another case. Resp. Br. at 16-17; MTLA Br. at 6-7. But the quoted material consisted of little more than a quotation from this Court's *Snell* decision, and was made in a case involving a proposed interpretation of a venue statute that would have favored *nonresidents* over residents.

[20] *See* Pet. Br. at 11-12, 18-22. Respondents also fail to distinguish the cases finding an equal protection violation in the discriminatory treatment of new residents of a state in favor of long-time residents. While the Court in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 911 (1986), relied upon the right to travel, it relied also upon the Equal Protection Clause as grounds for its decision.

sons to avoid arbitrary distinctions based on place of incorporation have grown stronger, as multistate business enterprises have become the rule, rather than the exception. *Saunders* remains good law and sound constitutional analysis.

III. MONTANA VENUE LAW EFFECTS REAL AND SUBSTANTIAL DISCRIMINATION AGAINST FOREIGN CORPORATIONS

Respondents and their amici variously attempt to trivialize this case by asserting that BN does not suffer any "real and substantial discrimination" under the "any county" rule in Montana, MTLA Br. at 8-13, and by complaining that BN is "attempt[ing] to do some forum shopping of its own here." Resp. Br. at 21. But improper venue either is or is not sufficiently important to be injurious, and the clear thrust of respondents' and their supporters' briefs is that venue *is* important.

Respondents therefore cannot force this case into the mold of *American Motorists Insurance Co. v. Starnes*, 425 U.S. 637 (1976). In that case, oral argument revealed that in actual practice the theoretical discovery advantage afforded domestic corporations did not exist. *Id.* at 643, 645. In addition, the broader geographic venue against foreign corporations was not challenged by the defendant in *Starnes* and was never addressed by the Court. *Id.* at 645-46; *see also* Pet. Br. at 34-36.

By contrast, the Montana venue law results in real and substantial discrimination.[21] Respondents have conceded

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In *Zobel v. Williams*, 457 U.S. 55 (1982), Justice O'Connor's concurrence was based on the right to travel, *id.* at 72, but the majority based its decision upon an equal protection analysis, *id.* at 60 n.6. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), and *Williams v. Vermont*, 472 U.S. 14 (1985), did not discuss the right to travel at all and nevertheless found violations of the Equal Protection Clause.

[21] The suggestion of MTLA that discrimination between classes of defendants in the provision of venue is somehow unworthy of constitutional complaint cannot be sustained under the Court's

the importance of venue in Montana by their own argument advancing convenience of the defendant as the crucial concern of the statute. *See* Resp. Br. at 8-11. Yet convenience applies as much to BN as to other, Montana-incorporated companies. BN's entire Montana Division is directed from Hill County. JA 20-21. The division's general manager, other management employees, and over half of all its Montana work force, plus its payroll and personnel files, are located there. *Id.*[22] The denial to BN of a venue residence in its home county in Montana puts BN at a real and substantial disadvantage as compared to its Montana-incorporated counterparts.

Respondents and amicus MTLA suggest that BN selected its principal Montana place of business in Hill County to inconvenience potential plaintiffs. But the reason for BN's selection of Havre as its Montana headquarters is apparent from any railroad map—Havre is located almost in the center of the BN main line across Montana, and is one of the largest towns on that line.[23] From a business standpoint, it is the logical location from

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precedents. *See, e.g., Saunders*, 274 U.S. at 495 (rejecting as "strained and inadmissible" the notion that *Snell* held venue provisions to be beyond the scope of the Equal Protection Clause).

[22] The fact that BN regularly retains counsel in Yellowstone and Cascade Counties to handle cases filed against it in those courts reflects only the fact that the suits are being filed in those two counties. It is not a relevant factor in determining the location of BN's principal office in Montana.

[23] Montana trial lawyers note that BN transferred a substantial number of employees from Yellowstone County to Hill County and imply that the purpose of this change was to create a different venue for litigation. But in 1988, BN sold over 600 miles of line (including most of its former main line through Yellowstone County) to a newly formed carrier, Montana Rail Link. *Montana Rail Link, Inc.— Exemption Acquisition & Operation—Certain Lines of Burlington N. R.R.*, Finance Docket No. 31089 (ICC Nov. 17, 1988). With the elimination of this line from the BN system, the number of employees in Yellowstone County and the functions performed there naturally declined, leaving the northern line as the hub of BN's Montana operations.

which to manage the Montana operations.[24] In any event, in seeking to have its principal place of business in Montana treated as its county of residence for venue purposes, petitioner seeks only the same rights enjoyed by domestic Montana corporations.

Once hauled into court in an inconvenient and unfair venue in Montana, an out-of-state corporate defendant cannot escape the resulting disadvantages. The disparate treatment does not dissolve as it did in *Starnes*. The convenience factors remain. The cited procedural safeguards do not cure the discrimination against foreign corporations. *See* MTLA Br. at 9-13. If those rules were as effective as amicus suggests, the discrimination experienced by BN in Montana would be far less acute. BN obviously takes full advantage of these remedies, where appropriate. However, it is evident that they have not levelled the playing field in these two Montana counties. Plaintiffs from distant states continue to file there, even though higher litigation costs may be involved. *See* Petition at 15-17 & nn. 21-22 and Pet. App. at 40a-41a. In addition, the verdicts are, on average, higher than elsewhere in Montana. *See* Reply Br. in Support of Petition at 7 & n.14.

The unusually high jury verdicts that cause plaintiffs to flock to Cascade and Yellowstone Counties do not ordinarily result from specific prejudice or self-interest that could be remedied by challenge to a particular juror or recusal of a judge. They result from the local culture of those counties and their jury venires. It is a recognized fact of trial practice that juries in certain locations are predisposed toward plaintiffs and toward generosity in

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[24] As one might expect of the chosen hub of a railroad's operations, Havre is by no means inaccessible. There are multiple daily flights between Havre and Billings, with connections to other cities in Montana and elsewhere. Havre is also served by Amtrak, and U.S. Highway 2 passes directly through the town.

damages.[25] The procedural safeguards cited by MTLA cannot and do not serve to eliminate the fundamental disadvantage of being dragged into court in a hostile venue. Amicus points to the statutory provision for obtaining a transfer of venue on grounds of *forum non conveniens*, but, as previously demonstrated, the Montana Supreme Court has explicitly held that the doctrine of *forum non conveniens* is not available in FELA cases such as this.[26] Nor does the statute providing for a change of venue when an impartial jury cannot be obtained offer much protection.[27] Thus, Montana, by providing only domestic corporations with a venue that limits their exposure to such forum-shopping, effects a real and substantial discrimination against foreign corporations.

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[25] Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* 82-83 (1991); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 Tul. L. Rev. 553, 556 (1989).

[26] *See, e.g., Haug v. Burlington N. R.R.*, 236 Mont. 368, 770 P.2d 517, 521 (1989) (citations omitted); *see also* Pet. Br. at 4 n.5.

[27] A request for a change of venue on grounds that an impartial jury cannot be obtained is within the district court's discretion to grant. *Guthrie v. Montana Dep't of Health & Envtl. Sciences*, 172 Mont. 142, 561 P.2d 913, 915 (1977); *Putro v. Mannix Elec., Inc.*, 147 Mont. 314, 412 P.2d 410, 412 (1966). Similarly, the determination whether to accept a challenge to a juror for cause rests in the judge's discretion and will rarely be overturned on appeal. *See* MCA § 25-7-223; *Anderson v. Burlington N., Inc.*, 218 Mont. 456, 709 P.2d 641, 646 (1985), *cert. denied*, 476 U.S. 1174 (1986) (upholding trial judge's denial of BN's challenge for cause of a juror who admitted that, as a shipper who utilized BN's services, he believed BN "grossly overcharg[ed] for its services").

Amicus MTLA also cites to statutes authorizing substitution of a judge without cause. But this does not really address BN's problem, which stems from the community culture that produces the jury venire. And even where it might be relevant, substitution of a judge can be effected only once, and the dismissed judge can continue to exercise substantial authority over such matters as drawing the jury, conducting preliminary pretrial conferences, and resolving other matters. MCA § 3-1-804.

As to the accusation that BN itself is engaging in forum shopping, the facts demonstrate otherwise. Plaintiffs and plaintiffs' counsel are the ones on the shopping spree here. Rationalizations that Great Falls and Billings are two of the larger cities *in Montana*, Resp. Br. at 20, cannot explain why plaintiffs are coming from states such as Washington, Wyoming, North Dakota, and South Dakota, and even from Colorado and Nebraska, to avail themselves of those two selected Montana locales. *See* Pet. App. at 40a-41a. The fact that many of the actions brought against BN in Montana, including the underlying cases here, are brought by out-of-state lawyers, belies the assertion that plaintiffs bring their cases in Great Falls and Billings "because that is where the major law firms are located . . . ." Resp. Br. at 20. Thus, there is far more to this pattern of forum shopping than respondents will admit.

Respondents ultimately exalt the type of forum shopping involved in this case, casting it as "a well-accepted part of our judicial system." Resp. Br. at 19 (citations omitted). Petitioner's objection, however, is not to forum shopping as such, but the fact that Montana has opened up an arbitrarily selected set of defendants to such extreme forum shopping. There is no reason to believe the Montana electorate would permit the Montana legislature to enact such a statute of general applicability, subjecting domestic and foreign corporations alike to "any county" venue. Indeed, such a statute would abrogate what the Montana legislature itself has termed "the most fundamental of all venue rules—that the defendant has the right to have the trial in his county of residence." *See supra* at 3 (quoting legislative history).

In sum, there is no rational basis for having tightly defined venue for domestic corporate defendants and wide-open, statewide venue for foreign corporations. All that BN is seeking is equal treatment under Montana's venue law, which confers on domestic corporate defendants the

right to be sued in the same county in which they have their principal place of business within the state. Under this Court's existing precedent, Montana's grant of this right to domestic corporations, and its refusal of the same right to foreign corporations that also have a fixed place of business in the state, constitutes a denial of equal protection.

CONCLUSION

For these reasons, the Court should reverse the decision and order of the Supreme Court of the State of Montana.

Respectfully submitted,

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